STATE OF MICHIGAN
IN THE SUPREME COURT

GEORGE BADEEN ET AL,

Plaintiffs-Appellants,

v

PAR, INC., d/b/a PAR NORTH AMERICA, REMARKETING SOLUTIONS ET AL,

Defendants-Appellees.
_____/

Supreme Court No. 147150

Court of Appeals No. 302878

Wayne Circuit Court
No. 10-004053-CZ

POST-ARGUMENT BRIEF OF AMICUS OF DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS

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Dated: May 21, 2014

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STATEMENT OF QUESTION PRESENTED

1. Whether the defendant forwarding companies engage in "soliciting a claim for collection" and therefore are "collection agenc[ies]" as defined by MCL 339.901(b).

Appellants' answer:	Yes.
Appellees' answer:	No.
Trial court's answer:	No.
Court of Appeals' answer:	No.
Department of LARA:	No.

INTRODUCTION

The Department of Licensing and Regulatory Affairs is the agency responsible for the licensing of "collection agencies," as defined by MCL 339.901. This is a regulatory function. As a consequence, the Department has a vital interest in the proper resolution of the question presented by this Court about whether forwarding companies are collection agencies by statute and subject to license. Like the appellees and the Court of Appeals, the Department contends that they do not meet the statutory definition and need not be licensed.

The Department is aware that this amicus brief arrives late in the day in this litigation. The parties argued the matter on application on April 2, 2014. But the Department only learned of the case *after* argument and contends that this Court will benefit from its long-standing interpretation and application of the statute. Once learning of the case, the Department has not delayed.

And it is important for the Court to understand that none of the forwarding companies that are a party to this case are located in the state of Michigan. MCL 339.904(2) specifically exempts a person whose "collection activities in this state are limited to interstate communications" from being licensed. Therefore, even if the Court were to adopt the position that forwarding companies are engaged in collection practices as defined by MCL 339.901, they may still be exempt.

Thus, the Department asks this Court to take one of three actions: (1) deny leave; (2) publish a decision affirming the conclusion that the forwarding companies are not "collection agencies;" or (3) if still unpersuaded after reviewing this brief, grant full review and allow the Department to participate further on the issue.

ARGUMENT

I. Forwarding companies, as a whole, should not be required to be licensed as collection agencies, because they do not meet the statutory definition of "collection agency" provided by the Occupational Code.

A. Standard of Review

This Court reviews *de novo* both a grant of summary disposition and questions of statutory interpretation. *Fisher v Foote Memorial Hospital,* 473 Mich 888; 703 NW3d 434 (2005).

Moreover, in *DiBenedetto v West Shore Hospital,* 461 Mich 394; 605 NW2d 300 (2000), this Court provided a succinct description of the controlling standards for statutory construction:

> When reviewing questions of statutory construction, our purpose is to discern and give effect to the Legislature's intent. We begin by examining the plain language of the statute. Where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed--no further judicial construction is required or permitted, and the statute must be enforced as written. We must give the words of a statute their plain and ordinary meaning, and only where the statutory language is ambiguous may we look outside the statute to ascertain the Legislature's intent.
>
> The primary goal of judicial interpretation of statutes is to ascertain the intent of the Legislature. The first criterion in determining intent is the specific language of the statute. The Legislature is presumed to have intended the meaning it plainly expressed. If the plain language of the statute is clear, no further judicial interpretation is necessary. [*DiBenedetto v West Shore Hospital,* 461 Mich 394, 402; 605 NW2d 300 (2000) (internal citations omitted).]

The language of MCL 339.901(b) is clear and unambiguous.

B. Analysis

The Occupational Code, 1980 PA 299, MCL 339.101 *et seq*, defines "collection agency" as "a person directly or indirectly engaged in soliciting a claim for collection or collecting or attempting to collect a claim owed or due or asserted to be owed or due another, or repossessing or attempting to repossess a thing of value owed or due or asserted to be owed or due another arising out of an expressed or implied agreement." MCL 339.901(b). The Department has interprets this definition as excluding specific forwarding companies from licensing requirements, because their practices do not meet the statutory definition of "collection agency."

Now, a group of third parties seek through suit to implement their own view of the Occupational Code without the participation of the Department charged with administering that Code. To allow these third parties the ability to litigate the proper construction of a statute that is implemented by the agency without its participation would fail to provide this Court with the full picture. Because Badeen's interpretation is incorrect, this Court should affirm the trial court and Court of Appeals' decisions in this matter.

1. The Department's interpretation concurs with the Court of Appeals' determination that forwarding companies do not meet the definition of "collection agency."

The Department has been responsible for licensing collection agencies since the implementation of the Occupational Code in 1980. The definition of "collection agency" has remained the same since July 1, 1981, when the Occupational Code was amended by 1981 PA 83. During that time, the Department has never received a

complaint against a forwarding company or been asked to investigate whether specific forwarding companies were engaged in conduct which would require a license under the Occupational Code.

In fact, the only time the Department has been contacted in connection with the practices of a forwarding company was when a representative of a company contacted it several years ago seeking guidance as to whether the company needed to be licensed pursuant to the Occupational Code. At that point, based on substantially the same reasoning employed by the Court of Appeals, the Department took the position that the forwarding company's practices did not meet the definition of "collection agency," and therefore was not required to be licensed.

Forwarding companies, in general, provide the service of identifying and contracting with the collection agency, which then provides the collection services. But most of the forwarding companies in this suit offer a variety of services including vehicle titling, remarketing, and end of lease management, none of which have anything to do with the collection practices regulated by the Occupational Code.

Further, the Department currently licenses 713 collection agencies, each of which must be under the personal supervision of a licensed collection agency manager or owner manager. MCL 339.908. In order to be licensed, a manager must pass an examination approved by the Department. MCL 339.911. The approved examination includes questions regarding, among other things, the Uniform Commercial Code, the Michigan Vehicle Code, the Revised Judicature Act,

and the Motor Vehicle Sales Finance Act, all of which goes well beyond the knowledge required to simply connect a lending institution with a collection agency. None of these other Acts apply to forwarding companies because they are not engaged in the type of business that the Legislature meant to regulate.

Finally, none of the forwarding companies who are a party to this case are located in Michigan.[1] The Occupational Code specifically provides that a person is not required to be licensed as a collection agency if "the person's collection activities in this state are limited to interstate communications." MCL 339.904(2). Thus, any forwarding company who is not located in Michigan and limits its business to interstate communications with lenders and Michigan collection agencies would not be required to be licensed as a collection agency in Michigan, regardless of how this Court defines practices.

2. Forwarding companies are also not statutorily required to be licensed under other provisions of MCL 339.901(b).

Much attention was paid by both parties to the definition of "collection agency" provided in the first sentence of MCL 339.901(a), as noted above. The statute's guidance as to who is a collection agency, however, does not end there. The other provisions describing a collection agency confirm that the forwarding companies are not collection agencies.

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[1] Defendant-Appellee, TD Auto Finance, LLC, is a Michigan limited liability company, but it is a lender, not a forwarding company.

a. Section 901(b) describes that a collection agency "includes" a person that engages in specific actions, none of which describes a forwarding company.

MCL 339.901(b) provides that "[a] collection agency shall include a person representing himself or herself as a collection or repossession agency, or a person performing the activities of a collection agency, on behalf of another, which are regulated by this act." Forwarding companies do not represent themselves as collections or repossession agencies, or perform collections activities. Moreover, MCL 339.901(b) further provides a collection agency includes businesses that make written demands for payment:

> A collection agency shall also include a person who furnishes or attempts to furnish a form or a written demand service represented to be a collection or repossession technique, device, or system to be used to collect or repossess claims, if the form contains the name of a person other than the creditor in a manner indicating that a request or demand for payment is being made by a person other than the creditor even though the form directs the debtor to make payment directly to the creditor rather than to the other person whose name appears on the form.

Forwarding companies do not send forms or other written demands for payment to debtors. Furthermore, MCL 339.901(b) also provides:

> Collection agency also includes a person who uses a fictitious name or the name of another in the collection or repossession of claims to convey to the debtor that a third person is collecting or repossessing or has been employed to collect or repossess the claim.

Forwarding companies do not collect or repossess claims.

b. Section 901(b) also excludes certain persons from the definition of "collection agency" consistent with excluding forwarding companies.

Most instructive, MCL 339.901(b) provides that "[c]ollection agency does *not* include a person *whose collection activities are confined to and are directly related to the operation of a business other than that of a collection agency . . . .*" (emphasis added.) The statute provides a list of examples of this situation, but specifically notes that the exclusion is not limited to the list. There is no question that the object of the forwarding companies' business is to act as a middle man between lenders and collection agencies. Therefore, because a forwarding company's activities are directly related to the operation of a business whose purpose is a service of matching lenders with licensed collection agencies – *not* to engage in collection activities –the company is exempt from the licensing requirement under the plain language of MCL 339.901(b).

To illustrate this provision, consider one of the provided examples. MCL 339.901(b)(xi) specifically excludes from the definition of "collection agency" "[a]n attorney handling claims and collections on behalf of clients and in the attorney's own name." Under this exclusion, even if most or all of the attorney's business involves collections work for clients, that attorney would still not be required to be licensed as a collection agency, because the attorney's primary business is the practice of law. By comparison, the forwarding companies' primary business is to act as a matchmaker; indeed, they conduct *no* actual collection activities. Thus, like attorneys, the forwarding companies are also excluded from the definition of "collection agency" under the plain language of the last sentence of MCL 339.901(b).

CONCLUSION AND RELIEF REQUESTED

The Department asks that this Court deny leave; or, in the alternative, issue a decision affirming the conclusion that the forwarding companies are not "collection agencies;" or in the alternative, if still unpersuaded after reviewing this brief, grant full review and allow the Department to participate further.

Respectfully submitted,

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Dated: May 21, 2014

LF: 2014-0077033-A/Badeen v Par Collection Agency License/0001136609S045/p.AmicusBrief

Dear Representative Abed

Thank you for your time to meet with me on SB 947. I appreciate your thoughtfulness on the matter and have responses to your questions. During our discussion you asked if there were different regulations for banks to collect their own debt and also if this bill would impact any of the current debt collection practices by licensed collection agencies.

The answers are not as clear-cut as I had hoped, but statute does provide a clarification. In short, there are different regulations for a bank or creditor to collect its own debt. They do not have to keep the records of a licensed collection agency, but do have to follow the rules laid out in the fair debt collection practices act (MCL).

The bill would not affect the way that collection agencies collect debt. The bill is targeted to clarify a Department of Licensing and Regulatory Affairs opinion. The Department has stated in an amicus brief that they do not nor have they ever considered forwarding agencies (companies who act as the middle man clearinghouse for creditors and licensed collection agencies) a collection agency and do not see a need for the practice to be licensed as it does not deal directly with the debtor. Additionally, the Department deems the transactions that occur with forwarders, especially PAR North America, are governed by interstate commerce and not subject to the licensing regulations of collection agencies. The Department does recognize the Fair Debt Collection Practices Act cover the forwarding agencies if there were any contact with debtors.

On the matter of creditors collecting their own debt, it is a little tricky. Under Michigan law, if *anybody* is engaged in consumer collection, you are regulated. This includes creditors collecting their own debts. One can see this if you look at the definition of a collection agency in the Occupational Code 339.901(b), towards the bottom of the long paragraph you will see something that says, "Collection agency does not include a person whose collection activities are confined and are directly related to the operation of a business other than that of a collection agency." So if you are engaged in "collection activities," but you are not operating a collection agency, collecting debts on behalf of other people as your occupation, then you are not a collection agency. (If you look at the specific examples listed in the statute, you will see lots of examples of occupations that involve people collecting their own claims. If you are not a collection agency in the true sense, and are just a creditor or otherwise fall within the exclusion, you do not require a license. But that is only half of it.

Now on to MCL 445.251. This is the "Regulation of Collection Practices

I don't think the trial court or the appeals court bought that for a second, but the trial court latched onto this "soliciting a claim for collection" issue, agreed with us that it meant "soliciting debtors for payment," and threw him out of court. The Supreme Court reversed, saying it means "contacting creditors to ask them to collect debts on their behalf." Since PAR doesn't collection, we don't "solicit collection", but because we were at a motion to dismiss stage (failure to make a claim that is even recognized at law), the court treats all the allegations of the complaint as true. Badeen's complaint said the forwarders solicit claims for collection. So, the court had to assume that was true and said, yep, forwarders are collection agencies when they solicit claims for collection.

The case isn't over, we still have lots of arguments to make before the trial court. Between you and me, I think the Supreme Court just flat got it wrong. They said that "soliciting a claim for collection" could not mean contacting a debtor for payment, because that is already covered by "attempting to collect a claim" in the very next section, so it would be redundant, unless soliciting a claim means asking creditors to hire the collection agency. However, the "collecting or attempting to collect" language uses the language "due or owing or asserted to be due or owing *to another."* So does "repossessing and attempting to repossess." That just makes the collection agency definition absolutely apply to third party collectors. If the phrase "soliciting a claim for collection" means contacting debtors to pay, however without the "due or owing asserted to be due or owing to another", then that means the statute applies to EVERYBODY who collects consumer debts, including creditors, UNLESS you are excluded because you are not actually running a collection agency business, but for example, you are running a health club and you are trying to collect overdue membership fees. You wouldn't have to carve out these people if they weren't included in the first place. And even if they are carved out, they can still be treated like a collection agency if they act like one, for example, if you are a creditor collecting your own claims, but tell the debtor you are actually "Acme Collection Agency," trying to scare them into thinking the matter has been escalated. (You can see this "dragback" clause in the part of the definition that starts, "A collection agency shall also include.")

Can you tell I could go on forever like this? If I could get someone to listen to me, I think we could fix this statute to say what was actually intended. But I hope I answered your question.